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Contents

Appellate Cases – Washington

■ *KING COUNTY V. KING COUNTY AND MULTNOMAH COUNTY V. MULTNOMAH COUNTY*

The substance of *King County, Department of Development and Environmental Services v. King County*, 177 Wash.2d 636, 305 P.3d 240 (2013), concerned application of the non-conforming use standard of the King County Code—spoiler alert: the landowner had not established the use prior to its becoming non-conforming. There are two remarkable aspects of this case. First, the Washington Supreme Court reached a unanimous decision—not particularly common for non-conforming-use cases in Washington. Second, and more interesting, is that King County appealed its own hearing examiner decision. The county's Land Use Petition Act ("LUPA") petition does not elaborate and the supreme court gave no attention at all to this odd posture. In Oregon, this case would not have been possible.

Some time ago, LUBA concluded that Oregon's statutes specifying standing do not permit a local government to appeal a decision of its own hearings official. ORS 197.830(2) provides that a person has standing to appeal a land use decision to LUBA only when that person has appeared before the local government. In *Multnomah County v. Multnomah County*, 46 Or. LUBA 365 (2004), the county argued that it "appeared" when "county planning staff presented oral and written testimony on behalf of the county during the proceedings before the hearings officer." *Id.* at 370. LUBA rejected this argument, pointing to several statutes governing LUBA's review that suggest the petitioner and respondent will be different parties and "at least nominally adverse." *Id.* at 372. LUBA did, however, recognize that in a different situation, the county might be an applicant or might provide by rule for a staff member to "appear" as a party. *Id.* at 374.

In contrast, RCW 36.70C.060, which specifies standing under LUPA, does not contain a specific "appearance" requirement. It confers standing on the applicant, the owner of the property, or a "person aggrieved or adversely affected by the land use decision." RCW 36.70C.020(4) defines person broadly, specifically including "governmental entity or agency." Still, RCW 36.70C.060 contains requirements that are similar to Oregon statutory requirements for LUBA review. LUBA noted that the petitioner must serve the local government. RCW 36.70C.040(3) contains that same requirement. Also, LUBA noted that it may award the prevailing party the cost of preparing the record. RCW 36.70C.110 similarly requires a petitioner to pay the cost of preparing the record prior to submittal and allows the court to equitably assess the cost of the record to the extent each party prevailed.

The case is an entertaining read, but the real interest is its reminder that the administrative law of land use practice in Oregon and Washington is quite different.

Jeffrey B. Litwak

King County, Dep't of Dev. & Envtl. Serv. v. King County, 177 Wash.2d 636, 305 P.3d 240 (2013)

■ *NO FREE RIDES: IN AN INVERSE CONDEMNATION ACTION, BURDEN OF PROOF ON DAMAGES COMPONENT LIES WITH PLAINTIFF*

In *Keene Valley Ventures, Inc. v. City of Richland*, 174 Wash. App. 219, 298 P.3d 121 (2013), Division III of the Washington Court of Appeals considered an issue of first impression: which party bears the burden of proof for damages in an inverse condemnation action. This inverse condemnation claim arose from actions by the City of Richland that diverted water onto the plaintiff's property. The court held that the burden to prove damages fell on plaintiff Keene Valley Ventures, and that it failed to do so.

In 2003, Keene Valley Ventures, Inc. ("KVV") purchased from Baines Corporation 21.6 acres of undeveloped land located in Richland. The city diverted water south of Keene Road to a ditch north of the road, causing water to flow occasionally from the ditch onto KVV's property. Over the course of a decade, more water was funneled onto the property. In January 2005, geotechnical-engineering studies revealed groundwater at 5.5, 7.5, and 2 feet below the surface and, in November of the same year, at 1.1, 1.2, and 2.5 feet. KVV attempted to sell the property twice in 2006 and 2007, but both sales failed to close. No evidence was provided at trial to explain why the sales were not finalized.

When KVV complained to the City about the standing water and the rising water table, the City responded that the water was purposely routed to the ditch consistent with the city's 2005 Storm Water Management Plan, which called for the creation of a retention pond in the area of KVV's property. In 2008, KVV filed suit and the trial court ruled in its favor on the issues of inverse condemnation, nuisance, and trespass. However, it also ruled the damage to the land was temporary and KVV failed to prove it had sustained any damages. As a result, KVV was awarded nominal damages and no attorney's fees.

On appeal, the court noted the evidence could have supported a finding that KVV suffered actual damages, but since the trial court did not find this evidence persuasive this court refused to reweigh it. Having believed it established the property was damaged, KVV argued it did not have the burden of proving the amount of damages, comparing it to ***State v. Amunsis***, 61 Wn.2d 160, 377 P.2d 462 (1963), in which the government was required to present evidence of a property's value when attempting to take it for public use. This was appropriate for land valuation in condemnation actions because, in that context, a jury could weigh the evidence and determine a suitable valuation.

This court distinguished ***Amunsis*** on the grounds that in an ***inverse*** condemnation case, the first element the plaintiff must prove is that there was a taking. To do that, the plaintiff must establish damages by showing a loss of property or a decrease in its value. If the government, rather than the plaintiff, were required to prove the amount of damages, the plaintiff would be relieved of proving an essential element. Accordingly, the court held that in an inverse condemnation action, the burden of proof falls on the plaintiff in establishing loss of property or a diminution in its value.

Both KVV and the city argued the taking was a permanent, rather than temporary one. Where injuries are permanent, damages are calculated based on the difference in property value before and after the damage; if temporary, the damage is calculated based on the cost of restoration. As an issue of fact, the court word normally defer to the decision of the trial court on whether damage is permanent or temporary. However, since KVV offered insufficient evidence to prove both the property's value before or after the damage and the necessary remediation costs, the court held KVV did not prove any damage under either standard. Thus, the distinction was irrelevant. Furthermore, the trial court did not err in refusing to award attorney's fees because that statute directs the award of such fees only when a landowner establishes actual damages, and nominal damages do not satisfy this standard.

In Washington, the burden to prove a taking has occurred falls on the plaintiff. The court expanded on this principle to establish that not requiring the plaintiff to prove damages could result in a free ride on the damages element required in an inverse condemnation action. For KVV to prove an inverse condemnation it must prove a taking, which requires KVV to establish damages. The court stated the trial court did not err in holding that "although Richland had inversely condemned the property . . . , KVV was not entitled to actual damages." 174 Wash. App. at 228. However, if KVV failed to meet its burden of proving damages, it also failed to prove a taking and thus could not have proved the city inversely condemned the property. Despite this, it appears that the trial court held, and appeals court affirmed, that KVV proved an inverse condemnation claim without proving actual damages.

Joseph F. Rosati

Keene Valley Ventures, Inc. v. City of Richland, 174 Wash. App. 219, 298 P.3d 121 (2013)

■ *WASHINGTON COURT REVIEWS FUZZY MATH BETWEEN CHURCH, PARKING, AND NEIGHBORHOOD*

In ***Families of Manito v. City of Spokane***, 172 Wash. App. 727, 291 P.3d 930 (2013), Division III of the Washington State Court of Appeals navigated a dispute between an expanding church and nearby residential concerns. St. Mark's Lutheran Church ("St. Mark's") filed a conditional use permit ("CUP") application to the City of Spokane to increase its current parking area. The Spokane Municipal Code ("SMC") allows religious institutions one parking space per 60 square feet of "main assembly area." SMC 17C.230.130, Table 17C.230–2.

Initially, the city planner approved the church's proposed calculation of the "main assembly area," which included the choir area, sanctuary, and fellowship hall. Under this calculation, the church was entitled to 101 parking spaces. In response, neighborhood opposition ("Manito") alleged adverse effects on the area (decreased property values, traffic and pedestrian safety issues, criminal activity, etc.). The city planner then recalculated and found that only the sanctuary and the fellowship hall qualified as the "main assembly area," thereby reducing the allowable parking spaces to 91. Both parties appealed to a hearing examiner. Before the hearing, the city planner conceded that the original 101-space plan was appropriate. The hearing

examiner accepted St. Mark's proposed mitigation measures that addressed some of the neighborhood concerns but otherwise left the proposal intact.

Manito appealed the decision under the Land Use Petitions Act ("LUPA"), Chapter 36.70(C) RCW, for review of the following: (1) whether the hearing examiner correctly included the fellowship hall in the main assembly area calculation; (2) whether the hearing examiner was authorized to base the final decision on the proposed mitigation modifications, without affording the parties an additional hearing; (3) whether the City of Spokane failed to follow procedure when it allowed a city planner, rather than a planning director, to make determinations and approve St. Mark's proposed plan; and (4) whether the city planner and the hearing examiner made an adequate interpretation of the quasi-judicial requirement pursuant to the SMC.

As a preliminary matter, the court deferred to the city planner in choosing to include the choir area, sanctuary, and fellowship hall in the main assembly area. It found that the calculations made regarding the number of parking spaces were not clearly erroneous under the city's code.

Next, Manito contended that the hearing examiner was not authorized to make a decision on the ***modified*** site plan without a new hearing. Manito argued that the modified site plan required a separate application process. However, the court noted that SMC 17G.050.320(B) authorized the hearing examiner to "affirm, modify, remand or reverse" any part of the decision being appealed. Here, the proposed modifications to the parking lot scheme did not substantially change the use, density, size, or traffic pattern of the area in a way that would have required a new application process. Moreover, the court held that the modifications proposed by St. Mark's were merely suggestions to the hearing examiner of how to address Manito's concerns, so they were at his disposal to use.

Similarly, the court rejected the contention that Spokane failed to follow proper procedure by allowing a city planner, rather than a planning director, to approve St. Mark's Type II CUP application. Manito alleged that this error deprived Manito of quasi-judicial rights because a Type II CUP application "is subject to a quasi-judicial decision of a department director . . . but does not require a public hearing." SMC 17A.020.200(O). The court held that, although the hearing examiner did not directly address the authoritative status of the city planner, it was necessarily implied in his decision and only the hearing examiner's decision was under review. The hearing examiner interpreted SMC 17A.010.070, which gives a planning director the ability to delegate his or her authority in order to administer land use applications. Any function given by the SMC to a particular office can be delegated to city personnel and that delegation need not be written.

Finally, the court found that the hearing examiner followed the proper procedure because Manito was given a quasi-judicial process on its appeal of the city planner's decision. Manito fully participated in the fairly-conducted

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hearing. In any event, because the hearing examiner properly determined that a Type II CUP permit could be issued administratively, the quasi-judicial requirement became unnecessary so that the appearance-of-fairness doctrine did not apply.

Gregory T. Myers

Families of Manito v. City of Spokane, 172 Wash. App. 727, 291 P.3d 930 (2013)

Cases From Other Jurisdictions

■ FOURTH CIRCUIT FINDS RIPENESS "PRUDENTIAL," ALLOWING TAKINGS CASE TO PROCEED IN FEDERAL COURT

Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013), involved plaintiff cottage owners' claims against a North Carolina town for, *inter alia*, alleged federal constitutional violations arising out of the abatement of an alleged nuisance with respect to several beachfront cottages. These claims, along with other state claims, were removed to federal court, which granted summary judgment to defendant town on the cottage owners' equal protection and procedural due process claims, found the takings claims unripe, and remanded the remaining state law claims to state court. The cottage owners appealed.

The cottages at issue are located on the outer banks of the North Carolina coast, which has eroded over the years so that the cottages are now located seaward of the natural vegetation line. The owners had attempted to secure their investments by placing deeper support pilings and putting extra sand around the cottages before storms. During a 2009 storm, the town ordered the cottage owners not to undertake these activities and to evacuate, with the result that the septic tank systems for the cottages were exposed.

The town's nuisance ordinance held that damaged structures are nuisances if they present a likelihood of personal or property injury or if they violate the public trust doctrine by being located on public areas. Applying this ordinance, the town declared the cottages to be public nuisances and said it would impose a $100-per-day fine if they were not removed, adding that no development permits would issue for a subsequent construction on the same land.

However, in early 2011 the town and the United States Army Corps of Engineers undertook a beach renourishment project, resulting in the town's declaration that the cottages were no longer a nuisance from the standpoint of their location with respect to public areas, and an invitation to their owners to apply for permits to repair them.

After removal to federal court, both parties moved for summary judgment. The trial court granted the town's procedural due process claim, either because there was no property right at issue or because the cottage owners had an adequate post-deprivation remedy in inverse condemnation. The court also granted the town's motion to dismiss the equal protection claim, finding the town's classification of the cottages as a public nuisance had a rational basis in assuring emergency access to the beach. In addition, the trial court dismissed the takings claim as unripe, while remanding the remaining state claims to state court.

The Fourth Circuit turned first to the procedural due process and equal protection claims dismissed on summary judgment. The court affirmed the dismissal of the procedural due process claim because plaintiffs were not deprived of a constitutional right and they paid no fine. Nuisance ordinances are recognized by the United States Supreme Court as permissible limitations on the use of land and the town was entitled to enforce its ordinance. The court noted a North Carolina case, decided after the town had declared the nuisance and before this litigation had commenced, found the state was the only entity that could enforce public trust claims. However, the issue had been undecided when the town began the nuisance proceedings and the court found no liability for the town's mistaken action.

As to the equal protection claim, the town's decision to enforce its ordinance against some cottage owners but not others did not constitute an equal protection violation. The town had presented a rational basis for the classification, both with respect to enforcing the public trust doctrine and because the cottages at issue were more likely to interfere with emergency vehicles than the others. The court held that summary judgment for the town on those claims was appropriate.

The trial court also dismissed the takings claims as unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), because it found that state courts must decide such claims. However, the court held the town had waived the ripeness defense by removing this case to federal court. *Hamilton Bank*, on the other hand, was a case brought originally in federal court. As a result, the United States Supreme Court concluded the case was not ripe because the takings clause requires claimants to seek available remedies in state courts before resorting to federal courts. In this case, the cottage owners filed their claims in state court as required by *Hamilton Bank* and the town availed itself of removal proceedings as it was permitted to do under federal law.

However, the Fourth Circuit declared ripeness in such cases to be "prudential," rather than jurisdictional, a position similar to that presaged by the United States Supreme Court in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734, 117

S.Ct. 1659, 137 L.Ed.2d 980 (1997). Even if, as the court found in ***Hamilton Bank***, state courts are more experienced in dealing with the complexities of land use, federal courts are capable of handling such cases as well. Moreover, refusing to hear a case in these circumstances denies a plaintiff a forum for its claim.

The court held that the town's removal of the case to federal court constituted a waiver of the town's ***Hamilton Bank*** defense. A defendant may not simultaneously invoke federal jurisdiction by removing the case and then object to federal jurisdiction under ***Hamilton Bank***. ***Hamilton Bank*** ordinarily requires that a takings claim against a state or local government be brought in state courts under state law, and removal acts to waive that protection. ***Hamilton Bank*** also guards innocent plaintiffs who brought their claims consistent with that case by preventing a defendant from manipulating litigation to deny a forum, and it is more consistent with a strong preference to decide cases on their merits.

The Fourth Circuit rejected the town's multiple arguments for a different result. It found no basis for the cottage owners to seek a remand, as it was the town's choice to remove the case to federal court. Moreover, the cottage owners were not required to reserve their federal claims for later litigation in federal court under ***England v. Louisiana Board of Medical Examiners***, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964. Additionally, removing the case to federal court has the same effect as ***England***, allowing the federal taking claim to proceed in a federal court and avoiding piecemeal litigation as well as manipulation to avoid a speedy resolution of controversies. Further, although a federal court may decide to abstain, this question only arises when the court has jurisdiction—a defendant may not contend for abstention and deny federal court jurisdiction at the same time.

The Fourth Circuit then turned to the trial court's discretionary determination declining to exercise supplemental jurisdiction over the remaining state law claims after it had remanded the federal claims to state court. That determination was based on the absence of federal claims, which the Fourth Circuit found to be incorrect. Moreover, North Carolina case law leaves little for clarification in state court and the appeals court expressed its confidence that the federal trial court would be able to handle those state law claims as well. Accordingly, the appeals court remanded the matter to the trial court to decide the case on its merits, abstain, or take an approach other than dismissal for ripeness reasons.

This case is significant in that it rules ineffective the defensive techniques often used by state and local governments to remove federal takings claims to federal court and then seek dismissal on ripeness grounds. The reasoning and results of this case are consonant with both the Federal Constitution and ***Hamilton Bank***.

Edward J. Sullivan

Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013)

■ *SECOND CIRCUIT AFFIRMS FINDING OF BREACH OF FAIR HOUSING CONSENT DECREE*

United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, 712 F.3d 761 (2nd Cir. 2013), was originally a ***qui tam*** action by relator Anti-Discrimination Center against defendant county for submission of false claims to the United States. These claims stated the county had and would "affirmatively further fair housing" on receiving funds from its grant applications. This obligation is required under 42 U.S.C. § 5304(b)(2). The litigation was concluded, following intervention of the United States, by a consent decree that required the county to pay $30 million to the United States. $21.6 million of that was to be credited to the county's account for fair housing and $2.5 million paid to the Anti-Discrimination Center in order to avoid treble damages, The county was also required to submit to a court-appointed monitor to assure compliance with the terms of the consent decree and to resolve disputes between the county and the United States. Finally, the county was required to "promote" legislation that would ban housing discrimination based on the source of a tenant's income (for example, Social Security, Section 8 vouchers, or public assistance).

The county failed to pass such legislation and, in the following legislative year, the county executive vetoed a weaker version of the original legislative proposal. The U.S. Department of Housing and Urban Development ("HUD") then removed the county from its list of eligible grantees and notified the county that it was in violation of the consent decree. The monitor agreed with the United States and the county appealed to the magistrate, who agreed with the County. The United States appealed to the district court, which agreed with the monitor and found a breach of the consent decree. The county then sought review.

The Second Circuit reviewed the consent decree ***de novo*** and applied an abuse-of-discretion standard, finding ordinary rules of contract interpretation applicable to determining intent of the parties. The court found the magistrate had jurisdiction, subject to district court review, under the contract. The court then turned to the requirement that the county executive "promote" legislation to ban source-of-income discrimination. While that requirement did not require the executive to originate legislation, it did require the executive to act affirmatively and assist in that effort. The language at issue was not hortatory, as suggested by defendant, but mandatory. The court also said the reference to legislation "currently before" the county legislature did not extinguish that duty when that legislative session had ended.

The court then determined that, because the county executive's sole response to the decree consisted of introducing the legislation, exhorting housing advocates to support the legislation, and vetoing the weaker bill, the county had breached the consent decree. The court found these actions were insufficient to fulfill the executive's obligation to promote legislation. The court also rejected the county's contention that the obligation was limited in duration to the terms of the members who had agreed to it. Because the decree required future action by the county, the court limited the rule against binding future elected officials to matters dealing with the structure of government and added that the county could not evade its responsibilities in this way.

The court rejected two additional defense contentions—*i.e.*, that the county could not by contract surrender certain reserved powers and, even if it could, the surrender must appear in the agreement in "unmistakable terms." The court said that the "unmistakability" claim was overcome by the county's contention that the promotion requirement could include a veto by the county executive. In any event, the court concluded that the contract was written in unmistakable terms.

Moreover, the contract obligations did not prevent the county from undertaking "sovereign acts, needful for the public good." Nor did the county unlawfully contract away its power—the county executive was obliged by the agreement to promote source-of-income legislation. That responsibility was not a violation of sovereignty. There was no demonstrable connection between the county's police power and the veto of this legislation and, in any event, the county itself allocated the risk of breach to itself in entering into the consent decree. The county executive could veto the legislation and assume the risk of the breach of the agreement.

Finally, the court rejected the county's contention that its interpretation would violate Article IV, Section 4 of the federal Constitution—guaranteeing a republican form of government—as both a non-justiceable political question and an argument that lacked an evidentiary basis. The court thus affirmed the circuit court's determination that the county had breached its duties under the consent decree.

Westchester has been a long-standing outlaw in fair-housing matters. The county is now faced with the responsibility of abiding by what it had previously agreed to or facing severe monetary consequences, or more, as a result of its conduct.

Edward J. Sullivan

U. S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, 712 F.3d 761 (2nd Cir. 2013)

LUBA Summaries

■ *LUBA JURISDICTION*

LUBA's decision in *Willamette Oaks, LLC v. City of Eugene*, ___ Or. LUBA ___, LUBA Nos. 2013-043, 2013-047 - 2013-051 (Sept. 11, 2013), is the latest in this long-running saga concerning the proposed development of a planned-unit development ("PUD") consisting of apartments, assisted living, club houses, a commercial structure, and open space adjacent to the petitioner's retirement facility. On the same day LUBA remanded the city's approval of the final PUD and subdivision plan for the project, the developer applied for building permits to allow construction of foundations for six buildings approved in the tentative PUD decision. The city reviewed the applications for compliance with conditions set out in development agreements with the city, the tentative PUD approval, and the final subdivision plat (which the city approved while the final PUD/subdivision plan was on appeal). The city issued the foundation permits and petitioner appealed.

Arguing the approvals were based on compliance with conditions of the previously approved tentative PUD plan, not city land use regulations, the city asserted the appealed permits were not statutory land use decisions and LUBA lacked jurisdiction to review them. Any applicable land use regulations were applied at the time of tentative PUD/subdivision approval and, according to the city code, were not considered at the time of building permit approval. Citing *Mar-Dene Corporation v. City of Woodburn*, 149 Or. App. 509, 515, 944 P.2d 976 (1997), LUBA agreed that "a decision that concerns only the application of a land use decision or conditions of approval attached to a land use decision does not concern the application of a land use regulation . . ." or result in a statutory land use decision. *Willamette Oaks, LLC*, slip op. at 8. LUBA also rejected the petitioner's argument that the city must have implicitly determined it had the authority to issue the permits despite LUBA's remand of the final PUD/subdivision plan. Even if that was true, petitioner failed to identify any statewide planning goal, comprehensive plan provision, or land use regulation the city applied in approving the foundation permits. While it is possible the city erred in issuing the permits, that is not an error LUBA has jurisdiction to review in the absence of an appealable land use decision.

Finally, LUBA disagreed with the petitioner's alternate argument that the approved permits were significant impact land use decisions. The approved tentative PUD plan addressed the land use impacts of the six buildings. Where, as here, an earlier land use approval does the "heavy lifting" of addressing relevant land use standards and development impacts and the subsequent approval of permits merely implements this decision, the permit approvals are not significant impact land

use decisions. LUBA phrased this rule as follows: "LUBA will decline to apply the significant impacts test to allow the Board to review decisions that merely implement earlier statutory land use approvals, even if those implementing decisions are the proximate step leading to actual construction or other actions affecting land use." *Id.*, slip op. at 12.

Without any reviewable land use decisions before it, LUBA granted the petitioner's motion to transfer the decisions to circuit court.

■ LOCAL PROCEDURE

The nature of ex parte contacts—specifically when and with whom a communication becomes an ex parte contact—is the focus of LUBA's ruling on an order asking to take extra-record evidence in ***Stop Tigard Oswego Project, LLC v. City of West Linn***, LUBA Nos. 2013-021 - 2013-023 (Sept. 25, 2013). Petitioners in these consolidated appeals challenged two city decisions approving the expansion of an existing water treatment facility and construction of an associated pipeline. At the conclusion of the initial hearings in January, Councilor Jones indicated he was leaning against approval but might change his position if supplemental conditions of approval could be drafted to address his concerns. Several weeks later, staff submitted a memorandum on February 8th with three draft conditions that responded to Jones' concerns. At the next hearing on February 11th, Jones moved to add five new conditions to the proposed staff conditions. He explained that "he woke up early on Saturday, February 9th, and concluded that additional conditions were necessary beyond the three drafted by staff." ***Stop Tigard Oswego Project, LLC***, slip op. at 6. At a subsequent hearing on February 18th, all of the council members, including Jones, stated they had no ex parte contacts since the last hearing. The city council voted unanimously in favor of the new conditions and in favor of adopting a final decision approving the facility expansion and new pipeline.

Petitioners appealed and argued that Jones' explanation of his reasons for the additional conditions and his change of mind indicated that he had undisclosed ex parte contacts with one of the respondents, Lake Oswego-Tigard Water Partnership ("LOT"), using city staff as a conduit for the contacts. Petitioners relied on a declaration of one of the petitioners, Gerber, that reported a conversation he had with Jones after the last hearing. In that conversation, Jones told Gerber that he first discussed his proposed conditions with city staff who then discussed them with LOT and reported back to Jones that LOT agreed to the conditions. Petitioners also cited a newspaper article in which the city manager said he had been in contact with LOT and Jones during the weekend of February 9th and 10th concerning the new conditions. Based on this information, petitioners asserted "any communications from LOT that city staff conveyed to Councilor Jones constitute ex parte communications and must be disclosed pursuant to ORS 227.180(3)." *Id.*, slip op. at 7.

Noting that neither city staff's contacts with an applicant nor with a decision maker constitute ex parte communications under ORS 227.180(4), LUBA denied the petitioners' request to take the depositions of the city manager, mayor and three other council members. LUBA did not rule out the possibility that an ex parte communication could occur if staff conveyed a direct communication from LOT to Jones. However, the information petitioners presented here—the Gerber declaration and the newspaper article—did not demonstrate that this is what occurred or identify whether, how or when Jones learned about LOT's concurrence. At most, it created an inference that city staff or the manager told Jones that LOT agreed to his new conditions.

Additionally, LUBA concluded that the subject matter of the alleged communication (LOT's agreement to the new conditions) was not one that Jones was required to disclose. In its decision in ***Link v. City of Florence***, 58 Or. LUBA 348, 353-54 (2009), LUBA held that an undisclosed ex parte contact sufficient to warrant remand must be a "communication that had something to do with the factual determinations or legal standards that govern approval or denial of the application." That is not the case here. In LUBA's view, any communication regarding Jones' proposed conditions of approval did not concern any approval criteria or factual assertions relevant to the underlying land use approvals and was not a "material consideration" for the city council.

Finally, LUBA noted one additional element of an ex parte contact: it must be something that is capable of rebuttal. That element is missing here as well. The information conveyed concerning LOT's agreement to Jones' proposed conditions of approval is simply not subject to rebuttal. Nor would any purpose be served in remanding the decision to allow petitioners to rebut this information. LUBA concluded petitioners failed to establish that allowing the requested depositions would demonstrate an undisclosed ex parte communication occurred and would require remand of the city's decisions.

■ WIND ENERGY FACILITIES

In ***Hatley v. Umatilla County***, ___ Or. LUBA ___, LUBA Nos. 2012-017/-018/-030 (Oct. 30, 2013) (***Hatley III***), LUBA resolved an outstanding preemption issue on remand from the Oregon Court of Appeals. The appellate court disagreed with LUBA's conclusion that petitioners were precluded from raising a preemption challenge to two county ordinances establishing setbacks and other requirements for wind energy facilities under ***Beck v. City of Tillamook***, 313 Or. LUBA 148, 831 P.2d 678 (1992). In ***Hatley v. Umatilla County***, 256 Or. App. 91, 301 P.3d 920 (2013), the court held ***Beck***'s issue preclusion principle applies only to appeals of quasi-judicial land use decisions and not to appeals of legislative land use decisions like the county

ordinances challenged here. The issue before LUBA on remand was whether the challenged ordinances were preempted by the Energy Facility Siting Council's ("EFSC") statutory authority and procedures for issuing site certificates for wind energy facilities. LUBA concluded the relevant statutes did not express a legislative intent to preempt the field of energy regulation, development, or siting and affirmed the county ordinances.

To obtain a site certificate from EFSC, ORS Chapter 469 requires an applicant to show a proposed facility complies with the statewide planning goals either by obtaining a local land use approval for the facility (Path A) or asking EFSC to determine the issue of goal compliance (Path B). Under Path B EFSC can decide whether a proposed wind energy facility complies with the applicable local land use regulations and rely on that determination to find goal compliance or make its own independent assessment of goal compliance. EFSC can also decide that an exception from the applicable statewide planning goals is appropriate.

LUBA rejected the petitioners' argument that the county's setback provisions are preempted by state statutes establishing programs for the use, development, and siting of renewable energy facilities. In LUBA's view, the relevant statutes "explicitly recognize and provide a role for local comprehensive plan and land use regulations in demonstrating that an energy facility complies with the statewide planning goals." ***Hatley III***, slip op. at 12. Additionally, ORS Chapters 197 and 215 authorize the county to regulate land uses, including utility facilities on EFU-zoned land zoned. Given this statutory framework, LUBA concluded the provisions of ORS Chapter 469 petitioners cited do not demonstrate an express or implied legislative intent for the state to preempt the field of energy facility regulation, development, and siting. If the legislature had intended to do so, it would not have created Path A and Path B for determining a proposed facility complies with the statewide planning goals. Similarly, the administrative rules implementing ORS Chapter 469 and establishing EFSC siting standards for energy facilities do not preclude the county from adopting a setback for wind energy facilities.

The petitioners' preemption challenge to the county's ordinances was framed as a facial challenge. To prevail, the petitioners must demonstrate the setback requirements are incapable of being applied consistently with the applicable law. LUBA concluded the petitioners failed to make this showing and affirmed the county's decision.

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